IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 124 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
PRAVIN INVESTMENT LTD. - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 03/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Mr. Manish R. Bhatt, learned counsel for the Revenue. None for the respondent. The Office Report shows that the respondent is served by Direct Service.

2. At the instance of the Revenue, the Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad, has referred the following question for opinion of this Court;

> 'Whether, in law and on facts the Appellate Tribunal is right in confirming the view taken by the CIT (A) in cancelling the additional tax levied by the ITO under section 104 of the I.T. Act, 1961 ?'

3. The facts, for disposal of the present matter, in nutshell, are that the assessee is an investment company which had a subsidiary company, namely, New Rajpur Mills Co.Ltd., and had submitted counter-guarantee to the Bank for various arrangements of the subsidiary Company to the tune of Rs. 4,90,22,640/-. In the Assessment Year 1983-84, the assessee company had distributable income of Rs. 1,22,449/-, they did not distribute dividend. Therefore the Income Tax Officer issued a notice to the assessee to show cause why additional tax of Rs. 61,224/- should not be levied under Section 104 of the Income Tax Act. The

Assessing Officer rejected the submission of the assessee and imposed the tax as proposed. Being aggrieved by the said order, the assessee took up the matter in appeal to the Commissioner of Income Tax. The Commissioner of Income tax, in his turn, observed his earlier order, in relation to Assessment Year 1982-83 between the same parties, held that the additional tax could not be levied. The matter was, thereafter, taken to the Tribunal by the Revenue. The Tribunal confirmed the order of C.I.T.(A). The matter was allowed to rest there and no application for Reference was made by the Revenue.

4. For the year 1983-84 when the very same controversy arose, the Income Tax Officer/Assessing Officer passed the very same order, the matter was taken to the Commissioner of Income Tax (Appeals), at the instance of the assessee, who, in his turn, allowed the Appeal and the order was confirmed by the Tribunal in Income Tax Appeal No. 900/And/1987. This time, being dissatisfied by the order, the Revenue made Reference Application No. 809/Ahd/1990, the Tribunal, holding that a referable question arises from the order passed by the Tribunal, referred the abovequoted question to this Court for its opinion.

4.A Section 104 of the Income Tax Act, 1961, virtually, is *pari materia* to Section 23-A of the Indian Income Tax Act, 1922. In the celebrated Judgment by the

Supreme Court in the case of *Commissioner of Income-Tax, West Bengal v. Gangadhar Banerjee And Co.(Private) Ltd., 57 ITR Page 176,* the Supreme Court had observed;

> '*The Income-tax Officer, in considering whether the payment of a dividend or a larger dividend than that declared by a company would be unreasonable within the meaning of section 23A of the Indian Income-tax Act, 1922, does not assess any income to tax. He only does what the directors should have done putting himself in their place. Though the object of the section is to prevent evasion of tax, the provision must be worked not from the standpoint of the tax collector but from that of a businessman. The reasonableness or unreasonableness of the amount distributed as dividends is judged by business considerations, such as the previous losses, the present profits, the availability of surplus money and the reasonable requirements of the future and similar others. The Income-*

tax Officer must take an overall picture of the financial position of the business. He should put himself in the position of a prudent businessman or the director of a company and deal with the problem with a sympathetic and objective approach.

In deciding whether the payment of a dividend or a larger dividend than that declared by the company would be unreasonable, the Income-tax Officer can take into consideration circumstances other than losses and smallness of profit. The statute, by the words used, while making sure that 'losses and smallness of profits' are never lost sight of, requires all matters relevant to the question of unreasonableness to be considered. Capital losses, if established, would be one of them'.

5. From the aforesaid observations made by the Apex Court, it would be clear that the object of the Section is to prevent evasion of tax, and the provision must not be worked out from the standpoint of tax collector but should

be worked out from the angle of a businessman. It would also be clear that, while considering the question relating to distributable income, the Income Tax Officer should take an overall picture of the financial position of the business, and, while doing so, he should put himself in the position of a prudent businessman or the Director of a Company and deal with the problem with a sympathetic and objective approach. The observations made by the Supreme Court make it imperative for the Income Tax Officer to consider the case from the standpoint of a businessman and to take a sympathetic approach taking into consideration the overall financial position of the Company and other problems which it may or may not face.

6. In a given case, where a Company puts some amount in reserve to meet the future unforseen contingency, then it cannot be straightway said that such amount was not an action of a prudent businessman. If the Revenue is of the opinion that the action is bad or is with the ulterior motive or is to avoid distribution of distributable income, then such facts are required to be brought on record and notice of such facts must be given to the assessee to controvert the allegations levelled against the conduct of the assessee.

7. In the present case, the Assessing Officer, but for

referring to the language of Section 104 (as applicable prior to 1986), has not dealt with any other matter.

8. True it is, that Section 104 is couched in particular words, but when the said words are interpreted by the Apex Court, then the law is to be understood as interpreted by the Apex Court.

9. Even otherwise, it is to be seen that, for the Assessment Year 1982-83, the submission/explanation made by the assessee was accepted by the Commissioner of Income Tax and the Tribunal had confirmed the view of the Commissioner of Income Tax (Appeal). If the assessee, relying upon the earlier years' action had followed the very same in the next year and the earlier year's action is approved by the highest Revenue Tax Tribunal, then it would be fallacious to say that the action of the assessee was motivated or was to achieve some illegal or sinister object.

10. Taking into consideration, the totality of the circumstances and the overall picture of the facts, we are of the opinion that, the Tribunal was not unjustified in confirming the order of Commissioner of Income Tax (Appeals) and the C.I.T. (Appeals) was also justified in accepting the explanation submitted by the assessee, and directing that no tax would be payable under Section 104 of

the Income Tax Act, 1961. The Reference is answered against the interests of the Revenue. It shall stand disposed of accordingly. No costs.

[R.S. Garg, J.]

[M.R. Shah, J.]

RMR.